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Calendar No. 265

98TH CONGRESS
1ST SESSION

S. 338

[Report No. 98-50]

To revise the procedures for soliciting and evaluating bids and proposals for Government contracts and awarding such contracts, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 1 (legislative day, JANUARY 25), 1983

Mr. COHEN (for himself, Mr. ROTH, Mr. LEVIN, Mr. RUDMAN, Mr. PERCY, Mr. DURENBERGER, Mr. STEVENS, Mr. DANFORTH, Mr. PRYOR, Mr. PROX-MIRE, Mr. HEINZ, and Mr. MITCHELL) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

FEBRUARY 2 (legislative day, JANUARY 25), 1983

Ordered, that if and when reported, the bill be referred to the Committee on Armed Services for not to exceed sixty calendar days (excluding any period of seven or more calendar days that the Senate is not in session) to consider any provisions which amend title 10 of the United States Code. Ordered further, that if the bill is not reported within the sixty-day period the committee will be discharged, but in no event will the committee be discharged prior to June 15, 1983

MARCH 23 (legislative day, MARCH 21), 1983

Reported by Mr. COHEN, with amendments

[Omit the part struck through and insert the part printed in italic]

Referred to the Committee on Armed Services pursuant to the order of February 2, 1983

MAY 12 (legislative day, MAY 9), 1983

Ordered, that the agreement of February 2, 1983, is modified to provide that in no event will the Committee on Armed Services be discharged prior to June 30, 1983

JUNE 27, 1983

Reported by Mr. COHEN, with amendments

[Omit the part in boldface brackets and insert the part printed in boldface]

A BILL

To revise the procedures for soliciting and evaluating bids and proposals for Government contracts and awarding such contracts, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Competition in Contract-
4 ing Act of 1983".

5 TITLE I—AMENDMENTS TO FEDERAL PROPERTY
6 AND ADMINISTRATIVE SERVICES ACT OF 1949

7 COMPETITIVE AND NONCOMPETITIVE PROCEDURES

8 SEC. 101. (a) Title III of the Federal Property and Ad-
9 ministrative Services Act of 1949 (41 U.S.C. 251 et seq.) is
10 amended—

11 (1) by striking out section 303 (41 U.S.C. 253)
12 and the heading of such section and inserting in lieu
13 thereof the following:

14 "COMPETITION REQUIREMENTS

15 "SEC. 303. (a) Except as provided in subsection (e) or
16 otherwise authorized by law, executive agencies shall use
17 competitive procedures in making contracts for property and
18 services. Executive agencies shall use advance procurement
19 planning and market research and shall prepare specifications
20 in such a manner as is necessary to obtain effective competi-
21 tion with due regard to the nature of the property or services

1 to be acquired. Executive agencies shall use the competitive
2 procedure or combination of competitive procedures that is
3 best suited under the circumstances of the procurement
4 action and shall specify its needs and solicit bids, proposals,
5 or quotations in a manner designed to achieve effective com-
6 petition for the contract.

7 “(b) An executive agency may award a contract under
8 this title in the procurement of property or services in order
9 to establish or maintain any alternative source or sources of
10 supply of such property or services if the executive agency
11 determines that to do so would (1) increase competition and
12 would likely result in reduced overall costs for such procure-
13 ment, or for any anticipated procurement, of such property or
14 services, or (2) be in the interest of industrial mobilization in
15 case of a national emergency.

16 “(c) Procurement regulations shall include special sim-
17 plified procedures and forms for small purchases to facilitate
18 making small purchases efficiently and economically.

19 “(d) For other than small purchases, an executive
20 agency, when using competitive procedures—

21 “(1) shall solicit sealed bids when—

22 “(A) time permits the solicitation, submis-
23 sion, and evaluation of sealed bids;

1 “(B) the award will be made on the basis of
2 price and other factors considered;

3 “(C) it is not necessary to conduct discus-
4 sions with the responding sources about their bids;
5 and

6 “(D) there is a reasonable expectation of re-
7 ceiving more than one sealed bid;

8 “(2) shall request competitive proposals when
9 sealed bids are not required under clause (1) of this
10 subsection.

11 “(e) An executive agency may use noncompetitive pro-
12 cedures only when—

13 “(1) the property and services needed by the Gov-
14 ernment are available from only one source and no
15 other type of property or services will satisfy the needs
16 of the executive agency;

17 “(2) the executive agency's need for the property
18 or services is of such *unusual and compelling* urgency
19 that the Government would be seriously injured by the
20 delay involved in using competitive procedures;

21 “(3) it is necessary to award the contract to a
22 particular source or sources in order to maintain an es-
23 sential industrial capability in the United States or to
24 achieve national industrial mobilization;

•

1 “(4) the terms of ~~any agreement with any inter-~~
2 *national agreement or treaty between the United States*
3 *Government and a foreign government*, or the direc-
4 tions of any foreign government reimbursing the execu-
5 tive agency for the cost of the procurement of the
6 property or services for such government, have the
7 effect of requiring the use of noncompetitive proce-
8 dures;

9 “(5) a statute provides that the procurement be
10 made through another executive agency or a specified
11 source; or

12 “(6) the disclosure of the executive agency's needs
13 to more than one source would compromise the nation-
14 al security.

15 “(f) An executive agency may not award a contract, ~~for~~
16 ~~other than small purchases, using noncompetitive procedures~~
17 ~~unless a notice has been published pursuant to section~~
18 ~~313(a)(1)(A).~~”; *using noncompetitive procedures unless—*

19 “(1) *in the case of any contract other than a*
20 *small purchase, a notice has been published with re-*
21 *spect to such contract pursuant to section 313 and all*
22 *bids, proposals, and quotations received in response to*
23 *such notice have been considered by such executive*
24 *agency; and*

1 “(2) in the case of any contract exceeding
2 \$100,000, the use of such procedures is approved by
3 the head of the organizational element of such executive
4 agency which has the responsibility to enter into such
5 contract or by a designee of the head of such organiza-
6 tional element who is higher in such organizational ele-
7 ment than the contracting officer issuing the solicita-
8 tion with respect to such contract.”;

9 (2) by adding at the end of section 309 (41
10 U.S.C. 259) the following new subsections:

11 “(b) The term ‘executive agency’ has the same meaning
12 as provided in section 4(a) of the Office of Federal Procure-
13 ment Policy Act (41 U.S.C. 403(a)), except that such term
14 does not include the departments or establishments specified
15 in section 2303(a) of title 10, United States Code.

16 “(c) The term ‘competitive procedures’ means proce-
17 dures under which an executive agency enters into a contract
18 after soliciting sealed bids or competitive proposals from
19 more than one source that is capable of satisfying the needs
20 of the executive agency.

21 “(d) The term ‘noncompetitive procedures’ means proce-
22 dures other than competitive procedures.

23 “(e) The term ‘small purchase’ means any purchase or
24 contract which does not exceed \$25,000. A proposed pro-
25 curement shall not be divided into several procurements pri-

1 marily for the purpose of using the small purchase proce-
2 dures.”; and

3 (3) by adding at the end thereof the following new
4 sections:

5 “SOLICITATION REQUIREMENTS

6 “SEC. 311. (a)(1) Each solicitation under this title shall
7 include specifications which—

8 “(A) consistent with the needs of the executive
9 agency, permit effective competition; and

10 “(B) include restrictive provisions or conditions
11 only to the extent necessary to satisfy such needs or as
12 authorized by law.

13 “(2) For the purposes of paragraph (1), the type of spec-
14 ification included in any solicitation shall depend on the
15 nature of the needs of the executive agency and the market
16 available to satisfy such needs. Subject to such needs, specifi-
17 cations may be stated in terms of—

18 “(A) function so that a variety of products or
19 services may qualify;

20 “(B) performance, including specifications of the
21 range of acceptable characteristics or of the minimum
22 acceptable standards; or

23 “(C) design requirements.

1 “(b) Each solicitation for sealed bids or competitive pro-
2 posals other than for small purchases shall include, in addi-
3 tion to the specifications described in subsection (a)—

4 “(1) a statement of—

5 “(A) all significant factors, including price,
6 which the executive agency reasonably expects to
7 consider in evaluating sealed bids or competitive
8 proposals; and

9 “(B) the relative importance assigned to
10 those factors;

11 “(2) in the case of sealed bids—

12 “(A) a statement that sealed bids will be
13 evaluated without discussions with the bidders;
14 and

15 “(B) the time and place for the opening of
16 the sealed bids; and

17 “(3) in the case of competitive proposals—

18 “(A) a statement that the proposals are in-
19 tended to be evaluated with, and awards made
20 after, discussions with the offerors but might be
21 evaluated and awarded without discussions with
22 the offerors; and

23 “(B) the time and place for submission of
24 proposals.

1 "EVALUATION AND AWARD

2 "SEC. 312. (a) An executive agency shall evaluate
3 sealed bids and competitive proposals based on the factors
4 specified in the solicitation.

5 "(b) All sealed bids or competitive proposals received in
6 response to a solicitation may be rejected if the head of the
7 executive agency determines that such action is in the public
8 interest.

9 "(c) Sealed bids shall be opened publicly at the time and
10 place stated in the solicitation. The executive agency shall
11 evaluate the bids without discussions with the bidders and
12 shall, except as provided in subsection (b), award a contract
13 with reasonable promptness to the responsible bidder whose
14 bid conforms to the solicitation and is most advantageous to
15 the United States, considering the price and the other factors
16 included in the solicitation under section 311(b)(1). The
17 award of a contract shall be made by transmitting written
18 notice of the award to the successful bidder.

19 "(d)(1) The executive agency shall evaluate competitive
20 proposals and may award a contract—

21 "(A) after discussions conducted with the offerors
22 at any time after receipt of the proposals and prior to
23 the award of the contract; or

1 “(B) without discussions with the offerors beyond
2 discussions conducted for the purpose of minor clarifi-
3 cation.

4 “(2) In the case of award of a contract under paragraph
5 (1)(~~a~~)(A), the executive agency shall conduct, before such
6 award, written or oral discussions with all responsible offer-
7 ors who submit proposals within a competitive range, price
8 and other evaluation factors considered.

9 “(3) In the case of award of a contract under paragraph
10 (1)(B), the executive agency shall award the contract based
11 on the proposals as received (and as clarified, if necessary, in
12 discussions conducted for the purpose of minor clarification).

13 “(4) The executive agency shall, except as otherwise
14 provided in subsection (b), award a contract with reasonable
15 promptness to the responsible offeror whose proposal is most
16 advantageous to the United States, considering price and the
17 other factors included in the solicitation under section
18 311(b)(1). The executive agency shall award the contract by
19 transmitting written notice of the award to such offeror and
20 shall promptly notify all other offerors of the rejection of their
21 proposals.

22 “(e) If the head of an executive agency considers that
23 any bid received under sealed bid procedures evidences a vio-
24 lation of the antitrust laws, he shall refer the bid to the At-
25 torney General for appropriate action.

1 "PROCUREMENT NOTICE

2 "SEC. 313. (a)(1) Except as provided in subsection (e)
3 and subject to paragraph (2)— (c)—

4 "(A) an executive agency intending to enter into
5 solicit bids, proposals, or quotations for a contract for
6 property or services at a price exceeding the maximum
7 amount established for small purchases in section
8 309(e) \$10,000 shall furnish for publication by the Sec-
9 retary of Commerce a notice described in subsection
10 (b)(1); and

11 "(B) an executive agency awarding a contract for
12 property or services at a price exceeding the maximum
13 amount established for small purchases in section
14 309(e) \$10,000 shall furnish for publication by the Sec-
15 retary of Commerce a notice announcing such award if
16 there is likely to be any subcontract under such con-
17 tract.

18 ~~"(2) The Administrator for Federal Procurement Policy~~
19 ~~may establish such minimum price as he considers appropri-~~
20 ~~ate for the purposes of paragraph (1) at an amount that is~~
21 ~~lower than the amount referred to in clause (A) or (B) of such~~
22 ~~paragraph.~~

23 "(2) The Secretary of Commerce shall publish promptly
24 in the Commerce Business Daily each notice required by
25 paragraph (1).

1 “(3) *Whenever an executive agency is required by para-*
2 *graph (1)(A) to furnish a notice of a solicitation to the Secre-*
3 *tary of Commerce, such executive agency may not—*

4 “(A) *issue such solicitation earlier than fifteen*
5 *days after the date on which such notice is published*
6 *by the Secretary of Commerce; or*

7 “(B) *establish a deadline for the submission of*
8 *bids, proposals, or quotations in response to such solici-*
9 *tation that is earlier than thirty days after the date on*
10 *which such solicitation is issued.*

11 “(b)(4) Each notice required by subsection (a)(1)(A) shall
12 *include—*

13 “(A) *be published as early as practicable in the*
14 *procurement process, but not less than thirty days*
15 *before the date set for the receipt of bids or proposals;*
16 *and*

17 “(B) *include—*

18 “(i) *a description of the property or services*
19 *to be contracted for, which description is not un-*
20 *necessarily restrictive of competition;*

21 “(ii) *the identity and location of the officer or*
22 *employee of the executive agency who may be*
23 *contacted for the purpose of obtaining a copy of*
24 *the solicitation;*

1 “(iii) a statement that any person may
2 submit a bid, proposal, or quotation which shall
3 be considered by the executive agency; and

4 “(iv) in the case of a procurement using non-
5 competitive procedures, a statement of the reason
6 justifying the use of noncompetitive procedures
7 and the identity of the intended source.

8 “(2) The Secretary of Commerce shall publish promptly
9 each notice required by subsection (a)(1)(B) after the time of
10 the award of the contract.

11 “(e) The requirements of subsection (a) do not apply
12 to—

13 “(1) any classified procurement with respect to
14 which a notice under such subsection cannot be written
15 in a manner which avoids the disclosure of classified
16 information; and

17 “(2) any procurement under conditions described
18 in clauses (2), (3), (4), or (5) of section 303(e).

19 “(1) a description of the property or services to be
20 contracted for, which description is not unnecessarily
21 restrictive of competition;

22 “(2) the name and address of the officer or em-
23 ployee of the executive agency who may be contacted
24 for the purpose of obtaining a copy of the solicitation;

1 “(3) a statement that any person may submit a
2 *bid, proposal, or quotation which shall be considered by*
3 *the executive agency; and*

4 “(4) in the case of a procurement using noncom-
5 *petitive procedures, a statement of the reason justifying*
6 *the use of noncompetitive procedures and the identity of*
7 *the intended source.*

8 “(c)(1) A notice is not required under subsection (a)(1)
9 *if the notice would disclose the executive agency's needs and*
10 *the disclosure of such needs would compromise the national*
11 *security.*

12 “(2) The requirements of subsection (a)(1)(A) do not
13 *apply—*

14 “(A) to any procurement under conditions de-
15 *scribed in clause (2), (3), (4), or (5) of section 303(e);*
16 *and*

17 “(B) in the case of any procurement for which the
18 *head of the executive agency carrying out such procure-*
19 *ment makes a determination in writing, with the con-*
20 *currence of the Administrator of the Small Business*
21 *Administration, that it is not appropriate or reasonable*
22 *to publish a notice before issuing a solicitation.*

23 “RECORD REQUIREMENTS

24 “SEC. 314. (a) Each executive agency shall establish
25 and maintain for a period of five years a record, by fiscal

1 year, of the procurements, other than small purchases, in
2 such fiscal year in which—

3 “(1) noncompetitive procedures were used; and

4 “(2) only one bid or proposal was received after
5 competitive procedures were used.

6 “(b) The record established under subsection (a) shall
7 include, with respect to each procurement—

8 “(1) information identifying the source to whom
9 the contract was awarded;

10 “(2) the property or services obtained by the Gov-
11 ernment under the procurement;

12 “(3) the total cost of the procurement;

13 “(4) the reason under section 303(e) for the use of
14 noncompetitive procedures; and

15 “(5) the position of the officers or employees of
16 the executive agency who required and approved the
17 use of noncompetitive procedures in such procurement.

18 “(c) The information included in the record established
19 and maintained under subsection (a) shall be transmitted to
20 the Federal Procurement Data Center referred to in section
21 6(d)(5) of the Office of Federal Procurement Policy Act (41
22 U.S.C. 405(d)(5)).”.

23 (b) The table of contents of such Act is amended—

24 (1) by striking out the item relating to section 303
25 and inserting in lieu thereof the following:

“Sec. 303. Competition requirements.”;

1 and

2 (2) by inserting after the item relating to section
3 310 the following new items:

"Sec. 311. Solicitation requirements.

"Sec. 312. Evaluation of bids; awards.

"Sec. 313. Procurement notice.

"Sec. 314. Record requirements.".

4 COST AND PRICING DATA

5 SEC. 102. Section 304 of the Federal Property and Ad-
6 ministrative Services Act of 1949 (41 U.S.C. 254) is amend-
7 ed by adding at the end thereof the following new subsection:

8 "(d)(1) A prime contractor or any subcontractor shall be
9 required to submit cost or pricing data under the circum-
10 stances listed below, and shall be required to certify that, to
11 the best of his knowledge and belief, the cost or pricing data
12 he submitted was accurate, complete, and current—

13 "(A) prior to the award of any prime contract
14 under this title using other than sealed bid procedures
15 where the price is expected to exceed ~~\$500,000~~
16 \$100,000;

17 "(B) prior to the pricing of any contract change or
18 modification for which the price adjustment is expected
19 to exceed ~~\$500,000~~ \$100,000, or such lesser amount
20 as may be prescribed by the head of the agency;

21 "(C) prior to the award of a subcontract at any
22 tier, where the prime contractor and each higher tier
23 subcontractor have been required to furnish such a cer-

1 tificate, if the price of such subcontract is expected to
2 exceed ~~\$500,000~~ \$100,000; or

3 “(D) prior to the pricing of any contract change
4 or modification to a subcontract covered by clause (C),
5 for which the price adjustment is expected to exceed
6 ~~\$500,000~~ \$100,000, or such lesser amount as may be
7 prescribed by the head of the agency.

8 “(2) Any prime contract or change or modification
9 thereto under which a certificate is required under paragraph
10 (1) shall contain a provision that the price to the Govern-
11 ment, including profit or fee, shall be adjusted to exclude any
12 significant sums by which it may be determined by the execu-
13 tive agency that such price was increased because the con-
14 tractor or any subcontractor required to furnish such a certifi-
15 cate, furnished cost or pricing data which, as of a date agreed
16 upon between the parties (which date shall be as close to the
17 date of agreement on the price as is practicable), was inaccu-
18 rate, incomplete, or noncurrent.

19 “(3) For the purpose of evaluating the accuracy, com-
20 pleteness, and currency of cost or pricing data required to be
21 submitted by this subsection, any authorized representative of
22 the head of the agency who is an employee of the United
23 States Government shall have the right, until the expiration
24 of three years after final payment under the contract or sub-
25 contract, to examine all books, records, documents, and other

1 data of the contractor or subcontractor related to the propos-
2 al for the contract, the discussions conducted on the proposal
3 under this chapter, pricing, or performance of the contract or
4 subcontract.

5 “(4) The requirements of this subsection need not be
6 applied to contracts or subcontracts where the price is based
7 on adequate price competition, established catalog or market
8 prices of commercial items sold in substantial quantities to
9 the general public, prices set by law or regulation or, in ex-
10 ceptional cases where the head of the executive agency de-
11 termines that the requirements of this subsection may be
12 waived and states in writing his reasons for such determina-
13 tion.”.

14 CONFORMING AMENDMENTS

15 SEC. 103. (a) Title III of the Federal Property and Ad-
16 ministrative Services Act of 1949 (41 U.S.C. 251 et seq.) is
17 amended—

18 (1) in section 302 (41 U.S.C. 252)—

19 (A) by striking out the second sentence in
20 subsection (b);

21 (B) by striking out subsections (c) and (d);
22 and

23 (C) by redesignating subsections (e) and (f) as
24 subsections (c) and (d), respectively;

1 (2) by striking out the heading of section 304 and
2 inserting in lieu thereof the following:

3 "CONTRACT REQUIREMENTS";

4 (3) in section 304 (41 U.S.C. 254)—

5 (A) by striking out "negotiated pursuant to
6 section 302(c)" in the first sentence of subsection
7 (a) and inserting in lieu thereof "awarded using
8 other than sealed bid procedures";

9 (B) by striking out "negotiated pursuant to
10 section 302(c)" in the second sentence of subsec-
11 tion (a) and inserting in lieu thereof "awarded
12 after using other than sealed bid procedures"; and

13 (C) by striking out "negotiated without ad-
14 vertising pursuant to authority contained in this
15 Act" in the first sentence of subsection (c) and in-
16 serting in lieu thereof "awarded after using other
17 than sealed bid procedures";

18 (4) in section 307 (41 U.S.C. 257)—

19 (A) by striking out "Except as provided in
20 subsection (b), and except" in the second sentence
21 of subsection (a) and inserting in lieu thereof
22 "Except";

23 (B) by striking out subsection (b);

24 (C) by striking out "by paragraphs (11)–(13),
25 or (14) of section 302(c)," in subsection (c);

1 (D) by redesignating subsection (c) as subsec-
2 tion (b); and

3 (E) by striking out subsection (d);

4 (5) by striking out "entered into pursuant to sec-
5 tion 302(c) without advertising," in section 308 and in-
6 serting in lieu thereof "made or awarded after using
7 other than sealed bid procedures"; and

8 (6) by striking out "section 302(c)(15) of this title
9 without regard to the advertising requirements of sec-
10 tions 302(c) and 303." in section 310 and inserting in
11 lieu thereof "the provisions of this title relating to
12 other than sealed bid procedures."

13 (b) The table of contents of such Act is amended by
14 striking out the item relating to section 304 and inserting in
15 lieu thereof the following:

"Sec. 304. Contract requirements."

16 TITLE II—AMENDMENTS TO TITLE 10, UNITED
17 STATES CODE

18 COMPETITIVE AND NONCOMPETITIVE PROCEDURES

19 SEC. 201. (a) Chapter 137 of title 10, United States
20 Code, is amended—

21 (1) in section 2302—

22 (A) by inserting "the Secretary, any Deputy
23 Secretary, any Under Secretary, or any Assistant
24 Secretary of Defense;" after "means" in clause
25 (1);

1 (B) by striking out clauses (2) and (3) of sec-
2 tion 2302 and inserting in lieu thereof the follow-
3 ing:

4 “(2) ‘Agency’ means any department or establish-
5 ment specified in section 2303(a) of this title.

6 “(3) ‘Competitive procedures’ means procedures
7 under which the head of an agency enters into a con-
8 tract after soliciting sealed bids or competitive propos-
9 als from more than one source that is capable of satis-
10 fying the needs of the agency.

11 “(4) ‘Noncompetitive procedures’ means proce-
12 dures other than competitive procedures.

13 “(5) ‘Small purchase’ means any purchase or con-
14 tract which does not exceed \$25,000. A proposed pro-
15 curement shall not be divided into several procure-
16 ments primarily for the purpose of using small pur-
17 chase procedures.”;

18 (2) in section 2303(a)—

19 (A) by redesignating clauses (1), (2), (3), (4),
20 and (5) as clauses (2), (3), (4), (5), and (6), respec-
21 tively; and

22 (B) by inserting before clause (2) (as redesign-
23 nated by subclause (A)) the following:

24 “(1) The Department of Defense.”;

1 (3) by striking out sections 2304 and 2305 and in-
2 serting in lieu thereof the following:

3 **“§ 2304. Competition requirements**

4 “(a) Except as provided in subsection (e) of this section
5 or otherwise authorized by law, the head of an agency shall
6 use competitive procedures in making contracts for property
7 **【and】 or** services. The head of an agency shall use advance
8 procurement planning and market research and shall prepare
9 specifications in such a manner as is necessary to obtain ef-
10 fective competition with due regard to the nature of the prop-
11 erty or services to be acquired. The head of an agency shall
12 use the competitive procedure or combination of competitive
13 procedures that is best suited under the circumstances of the
14 procurement action and shall specify the needs of the agency
15 and solicit bids **【,】 or** proposals **【, or quotations】** in a
16 manner designed to achieve effective competition for the con-
17 tract.

18 “(b) The head of an agency may **【award a contract**
19 under this title in the **】 provide for the** procurement of
20 property or services in order to establish or maintain any
21 alternative source or sources of supply **【of such】 under**
22 **this title using competitive procedures but exclud-**
23 **ing a particular source for that** property or services if
24 such head of an agency determines that to do so would (1)
25 increase **or maintain** competition and would likely result in

1 reduced overall costs for such procurement, or for any antici-
2 pated procurement, of property or services, **[or]** (2) be in
3 the interest of industrial mobilization in case of a national
4 **[emergency]** emergency, or (3) be in the interest of
5 national defense in establishing or maintaining an
6 essential research capability to be provided by an
7 educational or other nonprofit institution or a re-
8 search and development center funded by the
9 United States.

10 “(c) Procurement regulations shall include special sim-
11 plified procedures and forms for small purchases to facilitate
12 making small purchases efficiently and economically.

13 “(d) For other than small purchases, the head of an
14 agency, when using competitive procedures—

15 “(1) shall solicit sealed bids when—

16 “(A) time permits the solicitation, submis-
17 sion, and evaluation of sealed bids;

18 “(B) the award will be made on the basis of
19 price and other **price-related** factors **[consid-**
20 **ered]**;

21 “(C) it is not necessary to conduct discus-
22 sions with the responding sources about their bids;
23 and

24 “(D) there is reasonable expectation of re-
25 ceiving more than one sealed bid;

1 “(2) shall request competitive proposals from re-
2 sponding sources when sealed bids are not required
3 under clause (1) of this subsection.

4 “(e) The head of an agency may use noncompetitive
5 procedures only when—

6 “(1) the property **[and] or** services needed by
7 the Government are available from only one source
8 and no other type of property or services will satisfy
9 the needs of the agency;

10 “(2) the agency’s need for the property or services
11 is of such *unusual and compelling* urgency that the
12 Government would be seriously injured by the delay
13 **[involved in] associated with** using competitive
14 procedures;

15 “(3) it is necessary to award the contract to a
16 particular source or sources in order to **[maintain an**
17 essential industrial capability in the United States or to
18 achieve national industrial mobilization;] **(A) main-**
19 **tain a facility, producer, manufacturer, or**
20 **other supplier available for furnishing prop-**
21 **erty or services in case of a national emer-**
22 **gency, (B) achieve industrial mobilization in**
23 **the case of such an emergency, or (C) estab-**
24 **lish or maintain an essential research capa-**
25 **bility to be provided by an educational or**

1 **other nonprofit institution or a research and**
2 **development center funded by the United**
3 **States;**

4 “(4) the terms of ~~any agreement with any inter-~~
5 *national agreement or treaty between the United States*
6 *Government and a foreign government* **or interna-**
7 **tional organization**, or the directions of any foreign
8 government reimbursing the agency for the cost of the
9 procurement of the property or services for such gov-
10 ernment, have the effect of requiring the use of
11 noncompetitive procedures;

12 “(5) a statute **[provides]** **authorizes or re-**
13 **quires** that the procurement be made through another
14 agency or **from** a specified source; or **the agency’s**
15 **need is for a brand-name commercial item**
16 **for authorized resale; or**

17 “(6) the disclosure of the agency’s needs to more
18 than one source would compromise the national secu-
19 rity.

20 “(f) **For the purposes of applying section**
21 **2304(e)(1) hereof: (A) property or services shall be**
22 **considered to be available from a source if such**
23 **source has the capability to produce the property**
24 **or deliver the service in accordance with the Gov-**
25 **ernment’s specifications and delivery schedule,**

1 and (B) in the case of the procurement of techni-
2 cal or special property which has required a sub-
3 stantial initial investment or an extended period
4 of preparation for manufacture, and where it is
5 likely that production by a source other than the
6 original source would result in additional cost to
7 the Government by reason of duplication of in-
8 vestment or would result in duplication of neces-
9 sary preparation which would unduly delay the
10 procurement of the property, the property may be
11 deemed to be available only from the initial source
12 and may be procured through noncompetitive pro-
13 cedures.

14 **["(f)"]** **“(g) The head of an agency may not award a**
15 **contract; for other than small purchases, using nonecompeti-**
16 **tive procedures unless a notice has been published pursuant**
17 **to section 2305(c)(1)(A)(i) of this title. using noncompetitive**
18 **procedures unless—**

19 **“(1) the use of such procedures has been**
20 **justified in writing;**

21 **["(1) in the case of any contract other than a**
22 **small purchase,] “(2) a notice has been published**
23 **with respect to such contract pursuant to section 2305**
24 **(c) of this title and all bids [,] or proposals [, and**

1 *quotations*] received in response to such notice have
2 *been considered by such head of an agency; and*

3 **[“(2)” “(3)”** *in the case of any contract exceed-*
4 *ing \$100,000, the use of such procedures is approved*
5 *by the head of the organizational element of such*
6 *agency which has the responsibility to enter into such*
7 *contract or by a designee of the head of such organiza-*
8 *tional element who is higher in such organizational ele-*
9 *ment than the contracting officer issuing the solicita-*
10 *tion with respect to such contract.*

11 **“(h) For the purposes of the following laws,**
12 **purchases or contracts made under this chapter**
13 **using other than sealed bid procedures shall be**
14 **treated as if they were made with sealed bid proce-**
15 **dures:**

16 **“(1) Sections 35-45 of title 41.**

17 **“(2) Sections 276a-276a-5 of title 40.”**

18 **“§ 2305. Solicitation, evaluation, and award procedures;**
19 **notice requirements**

20 **“(a)(1)(A) Each solicitation under this title shall include**
21 **specifications which—**

22 **“(i) consistent with the needs of the agency,**
23 **permit effective competition; and**

1 “(ii) include restrictive provisions or conditions
2 only to the extent necessary to satisfy such needs or as
3 authorized by law.

4 “(B) For the purposes of subparagraph (A) of this para-
5 graph, the type of specification included in any solicitation
6 shall depend on the nature of the needs of the agency and the
7 market available to satisfy such needs. Subject to such needs,
8 specifications may be stated in terms of—

9 “(i) function so that a variety of products or serv-
10 ices may qualify;

11 “(ii) performance, including specifications of the
12 range of acceptable characteristics or of the minimum
13 acceptable standards; or

14 “(iii) design requirements.

15 “(2) Each solicitation for sealed bids or competitive pro-
16 posals other than for small purchases shall **at a minimum**
17 include, in addition to the specifications described in para-
18 graph (1) of this subsection—

19 “(A) a statement of—

20 “(i) all significant factors, including price,
21 which the executive agency reasonably expects to
22 consider in evaluating sealed bids or competitive
23 proposals; and

24 “(ii) the relative importance assigned to
25 **each of** those factors;

1 “(B) in the case of sealed bids—

2 “(i) a statement that sealed bids will be eval-
3 uated without discussions with the bidders; and

4 “(ii) the time and place for the opening of
5 the sealed bids; and

6 “(C) in the case of competitive proposals—

7 “(i) a statement that the proposals are in-
8 tended to be evaluated with, and awards made
9 after, discussions with the offerors but might be
10 evaluated and awarded without discussions with
11 the offerors; and

12 “(ii) the time and place for submission of
13 proposals.

14 “(b)(1) The head of an agency shall evaluate sealed bids
15 and competitive proposals based **solely** on the factors speci-
16 fied in the solicitation.

17 “(2) All sealed bids or competitive proposals received in
18 response to a solicitation may be rejected if the head of an
19 agency determines that such action is in the public interest.

20 “(3) Sealed bids shall be opened publicly at the time and
21 place stated in the solicitation. The head of an agency shall
22 evaluate the bids without discussions with the bidders and
23 shall, except as provided in paragraph (2) of this subsection,
24 award a contract with reasonable promptness to the responsi-
25 ble bidder whose bid conforms to the solicitation and is most

1 advantageous to the United States, **solely** considering the
2 price and the other factors included in the solicitation under
3 subsection (a)(2)(A) of this section. The award of a contract
4 shall be made by transmitting written notice of the award to
5 the successful bidder.

6 “(4)(A) The head of an agency shall evaluate competi-
7 tive proposals and may award a contract—

8 “(i) after discussions conducted with the offerors
9 at any time after receipt of the proposals and prior to
10 the award of the contract; or

11 “(ii) without discussions with the offerors beyond
12 discussions conducted for the purpose of minor clarifi-
13 cation **[.]** **where it can be clearly demonstrat-**
14 **ed from the existence of effective competition**
15 **or accurate prior cost experience with the**
16 **product or service that acceptance of an ini-**
17 **tial proposal without discussions would result**
18 **in fair and reasonable prices.**

19 “(B) In the case of award of a contract under subpara-
20 graph (A)(i) of this paragraph, the head of an agency shall
21 conduct, before such award, written or oral discussions with
22 all responsible offerors who submit proposals within a com-
23 petitive range, price and other evaluation factors considered.

24 “(C) In the case of award of a contract under subpara-
25 graph (A)(ii) of this paragraph, the head of an agency shall

1 award the contract based on the proposals received (and as
2 clarified, if necessary, in discussions conducted for the pur-
3 pose of minor clarification).

4 “(D) The head of an agency shall, except as provided in
5 paragraph (2) of this subsection, award a contract with rea-
6 sonable promptness to the responsible offeror whose proposal
7 is most advantageous to the United States, **solely** consider-
8 ing price and other factors included in the solicitation under
9 subsection (a)(2)(A) of this section. The head of the agency
10 shall award the contract by transmitting written notice of the
11 award to such offeror and shall promptly notify all other of-
12 ferors of the rejection of their proposals.

13 “(5) If the head of an agency considers that any bid
14 **[received under sealed bid procedures] or proposal** evi-
15 dences a violation of the antitrust laws, he shall refer the bid
16 **or proposal** to the Attorney General for appropriate
17 action.

18 “(c)(1)(A) Except as provided in paragraph (3) of this
19 ~~subsection and subject to subparagraph (B) of this para-~~
20 ~~graph—subsection—~~

21 “(i)**[a]** the head of an agency intending to enter
22 ~~into solicit bids~~ **[,] or, proposals [, or quotations]** for
23 a contract for property or services at a price **expect-**
24 **ed to [exceeding] exceed** the maximum amount es-
25 ~~tablished for small purchases in section 2302(5) of this~~

1 ~~title~~ \$10,000 shall furnish for publication by the Secre-
2 tary of Commerce a notice described in paragraph
3 (2)(A) of this subsection; and

4 “(ii) **[a]** the head of an agency awarding a con-
5 tract for property or services at a price exceeding the
6 maximum amount established for small purchases in
7 section 2302(5) of this title \$10,000 shall furnish for
8 publication by the Secretary of Commerce a notice an-
9 nouncing such award *if there is likely to be any sub-*
10 *contract under such contract.*

11 ~~“(B) The Administrator for Federal Procurement Policy~~
12 ~~may establish such minimum price as he considers appropri-~~
13 ~~ate for the purposes of subparagraph (A) of this paragraph at~~
14 ~~an amount that is lower than the amount referred to in clause~~
15 ~~(i) or (ii) of such subparagraph.~~

16 “(B) *The Secretary of Commerce shall publish prompt-*
17 *ly in the Commerce Business Daily each notice required by*
18 *subparagraph (A) of this paragraph.*

19 “(C) *Whenever a head of an agency is required by sub-*
20 *paragraph (A)(i) of this paragraph to furnish a notice of a*
21 *solicitation to the Secretary of Commerce, such head of an*
22 *agency may not—*

23 “(i) *issue such solicitation earlier than fifteen*
24 *days after the date on which such notice is published*
25 *by the Secretary of Commerce; or*

1 “(ii) establish a deadline for the submission of all
2 **[bids,] bids or proposals[, or quotations]** in re-
3 sponse to such solicitation that is earlier than thirty
4 days after the date on which such solicitation is issued.

5 “(2)(A) Each notice required by paragraph (1)(A)(i) of
6 this subsection shall *include*—

7 “(i) be published as early as practicable in the
8 procurement process, but not less than thirty days
9 before the date set for the receipt of bids or proposals;
10 and

11 “(ii) include a description of the property or serv-
12 ices to be contracted for (which description is not un-
13 necessarily restrictive of competition), the identity and
14 location of the officer or employee of the agency who
15 may be contacted for the purpose of obtaining a copy
16 of the solicitation, a statement that any person may
17 submit a bid, proposal, or quotation which shall be con-
18 sidered by the head of an agency, and in the case of a
19 procurement using noncompetitive procedures, a state-
20 ment of the reason justifying the use of noncompetitive
21 procedures and the identity of the intended source.

22 “(B) The Secretary of Commerce shall publish promptly
23 each notice required by paragraph (1)(A)(ii) of this subsection
24 after the time of the award of the contract.

1 ~~“(3) The requirements of paragraph (1) of this subsec-~~
2 ~~tion do not apply to—~~

3 ~~“(A) any classified procurement with respect to~~
4 ~~which a notice under such paragraph cannot be written~~
5 ~~in a manner which avoids the disclosure of classified~~
6 ~~information; and~~

7 ~~“(B) any procurement under conditions described~~
8 ~~in clause (2), (3), (4), or (5) of section 2304(e).”; and~~

9 “(A) **[a]** **an accurate** *description of the prop-*
10 *erty or services to be contracted for, which description*
11 *is not unnecessarily restrictive of competition;*

12 “(B) *the name and address of the officer or em-*
13 *ployee of the agency who may be contacted for the pur-*
14 *pose of obtaining a copy of the solicitation;*

15 “(C) *a statement that any person may submit a*
16 *bid **[,]** or proposal **[, or quotation]** which shall be*
17 *considered by the agency; and*

18 “(D) *in the case of a procurement using noncom-*
19 *petitive procedures, a statement of the reason justifying*
20 *the use of noncompetitive procedures and the identity of*
21 *the intended source.*

22 “(3)(A) *A notice is not required under paragraph (1)(A)*
23 *of this subsection if— **[the notice would disclose the agen-***
24 *cy’s needs and the disclosure of such needs would compromise*
25 *the national security. **]***

1 “(i) the notice would disclose the agen-
2 cy’s needs and the disclosure of such needs
3 would compromise the national security; or

4 “(ii) the proposed noncompetitive pro-
5 curement would result from acceptance of an
6 unsolicited research proposal that demon-
7 strates a unique or innovative research con-
8 cept and the publication of any notice of
9 such unsolicited research proposal would dis-
10 close the originality of thought or innovative-
11 ness of the proposed research or proprietary
12 data associated with the proposal.

13 “(B) *The requirements of paragraph (1)(A)(i) of this*
14 *subsection do not apply—*

15 “(i) *to any procurement under conditions de-*
16 *scribed in clause (2), (3), (4), or (5) of section 2304(e)*
17 *of this title; and*

18 “(ii) *in the case of any procurement for which the*
19 *head of the agency carrying out such procurement*
20 *makes a determination in writing, with the concurrence*
21 *of the Administrator of the Small Business Adminis-*
22 *tration, that it is not appropriate or reasonable to pub-*
23 *lish a notice before issuing a solicitation.”; and*

24 (4) by adding at the end thereof the following new
25 section:

1 **“§ 2316. Record requirements**

2 “(a) Each head of an agency shall establish and main-
3 tain for a period of five years a record, by fiscal year, of the
4 procurements, other than small purchases, in such fiscal year
5 in which—

6 “(1) noncompetitive procedures were used; and

7 “(2) only one bid or proposal was received after
8 competitive procedures were used.

9 “(b) The record established under subsection (a) of this
10 section shall include, with respect to each procurement—

11 “(1) information identifying the source to whom
12 the contract was awarded;

13 “(2) the property or services obtained by the Gov-
14 ernment under the procurement;

15 “(3) the total cost of the procurement;

16 “(4) the reason under section 2304(e) of this title
17 for the use of noncompetitive procedures; and

18 “(5) the position of the officers or employees of
19 the agency who required and approved the use of non-
20 competitive procedures in such procurement.

21 “(c) The information included in the record established
22 and maintained under subsection (a) shall be transmitted to
23 the Federal Procurement Data Center referred to in section
24 6(d)(5) of the Office of Federal Procurement Policy Act (41
25 U.S.C. 405(d)(5)).”.

1 (b) The table of sections at the beginning of such chap-
2 ter is amended—

3 (1) by striking out the items relating to sections
4 2304 and 2305 and inserting in lieu thereof the follow-
5 ing:

“2304. Competition requirements.

“2305. Solicitation, evaluation, and award procedures; notice requirements.”;

6 and

7 (2) by adding at the end thereof the following new
8 item:

“2316. Record requirements.”.

9 CONFORMING AMENDMENTS

10 SEC. 202. Chapter 137 of title 10, United States Code,
11 is amended—

12 (1) in section 2306—

13 (A) by striking out “may, in negotiating con-
14 tracts under section 2304,” in the second sen-
15 tence of subsection (a) and inserting in lieu thereof
16 “may in awarding contracts after using other than
17 sealed bid procedures”;

18 (B) by striking out “negotiated under section
19 2304” in the first sentence of subsection (b) and
20 inserting in lieu thereof “awarded after using
21 other than sealed bid procedures”;

1 (C) by striking out "section 2304 of this
2 title," in subsection (c) and inserting in lieu there-
3 of "this chapter";

4 (D) in subsection (f)(1)—

5 (i) by striking out clause (A) and insert-
6 ing in lieu thereof the following:

7 "(1) prior to the award of any prime contract
8 under this title after using other than sealed bid proce-
9 dures where the **contract** price is expected to exceed
10 ~~\$500,000~~ \$100,000;";

11 (ii) by striking out "negotiated" each
12 place it appears in the second paragraph; and

13 (iii) by striking out "negotiation," in the
14 third paragraph and inserting in lieu thereof
15 "proposal for the contract, the discussions
16 conducted on the proposal under this title,";
17 and

18 (iv) by striking out "\$500,000" each
19 place it appears in clauses (B), (C), and (D)
20 and inserting in lieu thereof "\$100,000; and

21 (E) by adding at the end thereof the follow-
22 ing new subsection:

23 "(i) Except in a case in which the Secretary of Defense
24 determines that military requirements necessitate the specifi-
25 cation of container sizes, no contract for the carriage of Gov-

1 ernment property in other than Government-owned cargo
2 containers shall require carriage of such property in cargo
3 containers of any stated length, height, or width.”;

4 (2) by striking out subsection (b) of section 2310
5 and inserting in lieu thereof the following:

6 “(b) Each determination or decision under section
7 2306(c), section 2306(g)(1), section 2307(c), or section
8 2313(c) of this title shall be based on a written finding by the
9 person making the determination or decision, which finding
10 shall set out facts and circumstances that (1) clearly indicate
11 why the type of contract selected under section 2306(c) is
12 likely to be less costly than any other type or that it is im-
13 practicable to obtain property or services of the kind or qual-
14 ity required except under such a contract, (2) support the
15 findings required by section 2306(g)(1), (3) clearly indicate
16 why advance payments under section 2307(c) would be in the
17 public interest, or (4) clearly indicate why the application of
18 section 2313(b) to a contract or subcontract with a foreign
19 contractor or foreign subcontractor would not be in the public
20 interest. Such a finding is final and shall be kept available in
21 the agency for at least six years after the date of the determi-
22 nation or decision. A copy of the finding shall be submitted to
23 the General Accounting Office with each contract to which it
24 applies.”;

1 (3) by striking out section 2311 and inserting in
2 lieu thereof the following: "The head of an agency may
3 delegate, subject to his direction, to any other officer
4 or official of that agency, any power under this chap-
5 ter."; and

6 (4) by striking out "negotiated" in the second sen-
7 tence of section 2313(b) and inserting in lieu thereof
8 "awarded after using other than sealed bid proce-
9 dures".

10 **TITLE III—ADVOCATE FOR COMPETITION;**

11 **ANNUAL REPORT ON COMPETITION**

12 **DEFINITION**

13 **SEC. 301.** For the purposes of this title, the term "ex-
14 ecutive agency" has the same meaning as provided in section
15 4(a) of the Office of Federal Procurement Policy Act (41
16 U.S.C. 403(a)).

17 **ADVOCATE FOR COMPETITION**

18 **SEC. 302.** (a)(1) There is established in each executive
19 agency an advocate for competition.

20 (2) Each head of an executive agency shall—

21 (A) designate for each executive agency one offi-
22 cer or employee serving in a position authorized for
23 such executive agency on the date of enactment of this
24 Act to serve as the advocate for competition;

1 (B) relieve such officer or employee of all duties
2 and responsibilities that are inconsistent with the duties
3 and responsibilities of the advocate for competition; and

4 (C) provide such officer or employee with such
5 staff or assistance as may be necessary to carry out the
6 duties and responsibilities of the advocate for competi-
7 tion.

8 (b)(1) The advocate for competition shall promote com-
9 petition in the procurement of property and services.

10 (2) The advocate for competition in an executive agency
11 shall—

12 (A) review the purchasing and contracting activi-
13 ties of the executive agency;

14 (B) identify and report to the head of the execu-
15 tive agency—

16 (i) opportunities to achieve competition on
17 the basis of price and other significant factors in
18 the purchases and contracts of the executive
19 agency;

20 (ii) solicitations and proposed solicitations
21 which include unnecessarily detailed specifications
22 or unnecessarily restrictive statements of need
23 which may reduce competition in the procurement
24 activities of the executive agency; and

1 (iii) any other condition or action which has
2 the effect of unnecessarily restricting competition
3 in the procurement actions of the executive
4 agency; and

5 (C) prepare and transmit to the head of the execu-
6 tive agency an annual report describing his activities
7 under this section.

8 ANNUAL REPORT

9 SEC. 303. (a) Not later than September 30 of each of
10 1983, 1984, 1985, and 1986, each head of an executive
11 agency shall transmit to the Committee on Governmental Af-
12 fairs of the Senate and the Committee on Government Oper-
13 ations of the House of Representatives an annual report in-
14 cluding the information specified in subsection (b).

15 (b) Each report transmitted under subsection (a) shall
16 include—

17 (1) a specific description of all actions that the
18 head of the executive agency intends to take during
19 the next fiscal year to—

20 (A) increase competition for contracts with
21 the executive agency on the basis of price and
22 other significant factors; and

23 (B) reduce the number and dollar value of
24 contracts entered into by the executive agency
25 after soliciting bids or proposals from, or evaluat-

1 ing bids or proposals with discussions with, only
2 one source; and

3 (2) a summary of the activities and accomplish-
4 ments of the advocates for competition of the executive
5 agency during the fiscal year in which the report is
6 transmitted.

7 ~~TITLE IV—NOTICE REQUIREMENTS UNDER THE~~
8 ~~SMALL BUSINESS ACT~~

9 ~~SEC. 401. Section 8(e) of the Small Business Act (72~~
10 ~~Stat. 389; 15 U.S.C. 637(e)) is repealed.~~

11 ~~TITLE V—APPLICABILITY~~

12 ~~SEC. 501. 401.~~ The amendments made by this Act shall
13 apply with respect to any solicitations for bids or proposals
14 issued on or after the date **[one hundred and eighty] two**
15 **hundred and seventy** days after the date of the enact-
16 ment of this Act.

Calendar No. 265

98TH CONGRESS
1ST Session

S. 338

[Report No. 98-50]

A BILL

To revise the procedures for soliciting and evaluating bids and proposals for Government contracts and awarding such contracts, and for other purposes.

JUNE 27, 1983

Reported with amendments